

SENATE RECORD VOTE ANALYSIS

105th Congress
2nd Session

Vote No. 289

September 28, 1998, 5:29 p.m.
Page S-11039 Temp. Record

FEDERAL VACANCIES ACT/Cloture

SUBJECT: Federal Vacancies Reform Act . . . S. 2176. Lott motion to close debate.

ACTION: CLOTURE MOTION REJECTED, 53-38

SYNOPSIS: As reported, S. 2176, the Federal Vacancies Reform Act of 1998, will amend the Vacancies Act, primarily to make clear its full application to the Justice Department and to other Federal departments and agencies. Article II, Section 2 of the Constitution gives the President the power to appoint all officers of the United States, subject to the advice and consent of the Senate. It further states that Congress, by law, may cede the Senate's advice and consent power for lower-ranking employees of the Executive Branch. Congress has given broad authority to the Executive Branch to hire employees without requiring Senate confirmation. Those high-ranking positions that require Senate confirmation to be filled have been specified by law. The Vacancy Act, which was first enacted in 1868, sets forth the terms under which Federal positions that require Senate confirmation may be temporarily filled without Senate confirmation, on an acting basis, when they unexpectedly become vacant. The Justice Department has long claimed that the Vacancy Act does not apply to its vacancies for positions requiring confirmation because its enabling legislation vests the Attorney General with the power to delegate powers and functions to subordinate officials or employees. The Justice Department argues that this authority supersedes the Vacancy Act's requirements. Other Federal departments and agencies have begun to follow the Justice Department's lead in appointing acting officials for indefinite periods of time, without receiving or even seeking Senate confirmation. This bill will make clear that enabling statutes do not supersede Vacancy Act requirements.

Other specific provisions of the bill include the following:

- upon the death, resignation, or inability to serve of a Senate-confirmed officer, the first assistant to that officer will become the acting officer, or, at the President's discretion, a person who has already received Senate confirmation to another position may be made the acting officer;
- an acting officer will be allowed to serve for 150 days (the current-law limit is 120 days);

(See other side)

YEAS (53)			NAYS (38)		NOT VOTING (9)	
Republicans (52 or 100%)	Democrats (1 or 3%)		Republicans (0 or 0%)	Democrats (38 or 97%)	Republicans (3)	Democrats (6)
Abraham	Hutchinson	Byrd		Akaka	Bond ⁻²	Hollings ⁻²
Allard	Hutchison			Baucus	D'Amato ⁻²	Kennedy ⁻²
Ashcroft	Inhofe			Biden	Sessions ⁻²	Moseley-Braun ⁻²
Bennett	Jeffords			Bingaman		Reid ^{-2AN}
Brownback	Kempthorne			Boxer		Torricelli ⁻²
Burns	Kyl			Breaux		Wyden ⁻²
Campbell	Lott			Bryan		
Chafee	Lugar			Bumpers		
Coats	Mack			Cleland		
Cochran	McCain			Conrad		
Collins	McConnell			Daschle		
Coverdell	Murkowski			Dodd		
Craig	Nickles			Dorgan		
DeWine	Roberts			Durbin		
Domenici	Roth			Feingold		
Enzi	Santorum			Feinstein		
Faircloth	Shelby			Ford		
Frist	Smith, Bob			Glenn		
Gorton	Smith, Gordon			Graham		
Gramm	Snowe					
Grams	Specter					
Grassley	Stevens					
Gregg	Thomas					
Hagel	Thompson					
Hatch	Thurmond					
Helms	Warner					

EXPLANATION OF ABSENCE:

- 1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:

- AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

- if the President submits a nominee to the Senate before the expiration of the 150 days, the acting officer may continue to serve until the Senate acts on that nomination, and if that person is not confirmed the nominee may serve for 150 days after the final action on that nomination;

- the 150-day limit will be extended to 240 days for vacancies in the first 60 days after the inauguration of a new President;
- if the 150-day period for an acting officer expires, the President will be allowed to submit a nominee and then appoint an acting officer; and

- acting officers who exceed the time limits in this bill will not be permitted to perform the duties of the vacant offices; only the heads of their agencies will be permitted to perform those duties.

On September 24, 1998, Senator Lott sent to the desk, for himself and others, a motion to close debate on the bill.

NOTE: A three-fifths majority (60) vote is required to invoke cloture.

Those favoring the motion to invoke cloture contended:

This vote should not be partisan. The subject before the Senate is constitutional. It is about reasserting the Senate's authority over executive appointments. That authority has been encroached upon for the past 25 years by the Justice Department. The first offense was during the Watergate investigation, when the Justice Department appointed an acting director of the Federal Bureau of Investigation in open defiance of Vacancy Act requirements to submit a nominee for the post to the Senate for confirmation. It asserted, and it has continued to assert, that the authority given by Congress to the Attorney General to delegate authority supersedes Vacancy Act limits on the time that any person may serve in an acting capacity in a position requiring Senate confirmation. The Justice Department has encouraged other departments and agencies to follow its lead, and many of them have. The problem has become worse over the years, to the point that right now 20 percent of all positions requiring Senate confirmation have acting officials in them. Some of those officials have been in their posts for years without the Administration nominating anyone to serve.

Unfortunately, many Democratic Senators, though not all, have said that they oppose cloture because if cloture is invoked Senate rules will only allow germane amendments to be invoked. They argue that relevant amendments should also be offered, and have listed several amendments that they would like to offer but that they do not think meet the germaneness test. However, we believe that most of the examples they have given, such as their proposal to lengthen the period that an acting officer could serve, are clearly germane proposals. The one exception is their proposal to put a time- limit on the Senate to act on a nominee once submitted. That proposal is relevant, but not germane. The purpose of this bill is to reassert the Senate's constitutional authority on confirming high-ranking officials. How the Senate chooses to exercise that authority is a relevant, political question, but it is not germane to the issue at hand.

Issues of germaneness aside, we strongly oppose putting a time limit on the Senate for considering nominees. Nothing in the Constitution requires the Senate to ever act on any nominees, and we note that it has been a common practice throughout the history of the Senate for some nominees to remain on the calendar for extended periods of time. Senators may often have valid reasons for not wanting to act on particular nominees, and they are fully within their constitutional rights not to act. The President, though, is not within his constitutional rights to pollute the executive branch with "acting" officials instead of seeking Senate confirmation for his appointees. It is almost as if some of our Democratic colleagues are saying that the price of their agreeing to take back the constitutional authority that the Executive Branch has usurped is that the Senate must give up another constitutional right. We hope that they will not insist on this position. The President has neither the right to make unilateral appointments nor the right to make the Senate vote on his nominees within a specific timeframe.

Our hope was to pass this bill this year with strong bipartisan support. Unfortunately, though, it appears that this vote will be on largely partisan lines. We still remain confident, though, that an agreement will be reached. Next Congress, it is very likely that this bill will be enacted, over a presidential veto if necessary.

Those opposing the motion to invoke cloture contended:

We believe we were very close to reaching agreement on the provisions of this bill. Unfortunately, Democratic Senators who were negotiating in good faith on several issues were blindsided when cloture was filed prematurely on the bill. If we Democrats were to vote for cloture now, we do not know if we would have enough time to debate our germane amendments thoroughly, and we would not be allowed to offer any of the relevant amendments which we wish to have considered. As the bill is currently drafted, it is worthy of being debated, but it is not worthy of being passed. We have the votes to block cloture, but we do not have the votes to block passage. Our Republican colleagues, if cloture were invoked, could reject our amendments out of hand and then pass the bill in its currently flawed form. We know that the President would then veto the bill, and his veto would be sustained. To avoid going through that futile exercise, we are forced to oppose cloture at this time.